LEGISLATIVE COUNCIL BRIEF

Securities and Futures Ordinance (Cap. 571)

SECURITIES AND FUTURES (UNSOLICITED CALLS - EXCLUSION) RULES

INTRODUCTION

Pursuant to section 397(1) of the Securities and Futures Ordinance (Cap. 571) (the SFO), the Securities and Futures Commission (the SFC) has made the Securities and Futures (Unsolicited Calls - Exclusion) Rules **(**the Rules**)** at the **Annex**.

BACKGROUND

The SFO

2. The SFO was enacted in March 2002. It consolidates and modernizes ten existing ordinances governing the securities and futures markets into a composite piece of legislation to keep the regulatory regime on a par with international standards and practices. For effective regulation, the SFO provides flexibility in addressing changing market practices and global conditions by empowering the Chief Executive in Council, the Financial Secretary, the Chief Justice and the SFC to prescribe detailed and technical requirements as necessary by way of subsidiary legislation, to supplement the regulatory framework laid down under the primary legislation.

3. On 22 February 2002, the House Committee of the Legislative Council established a Subcommittee on Draft Subsidiary Legislation to be made under the SFO (the Subcommittee) to study the subsidiary legislation necessary for commencing the SFO. From March 2002 to October 2002, the Subcommittee held 12 meetings and considered a total of 37 items of draft subsidiary legislation, including the *vires* to make them.

THE PROPOSALS

Major policy considerations

4. Section 174 of the SFO prohibits generally unsolicited calls made by intermediaries and their representatives in relation to securities, futures contracts, leveraged foreign exchange contracts and securities margin financing, in order to protect members of the public from being pressured into buying financial products they do not want or cannot afford during the course of such calls. "Unsolicited call" is defined as any call made otherwise than at the express invitation of the person called upon and "call" is defined very widely[1] so as to cater for emerging communication means. The targets, however, are primarily those high-pressure sales techniques and the provision accordingly empowers the SFC to make rules under section 397 to exclude certain types of calls from the prohibition. Moreover, the provision also empowers the SFC to exclude from the prohibition calls made by or to prescribed classes of persons, and calls in relation to prescribed classes of agreements. The SFC, after consultation with the Hong Kong Monetary Authority (the HKMA), has made the Rules so as to prescribe the exclusions which it considers are acceptable from the perspective of investor protection. In drafting the Rules, reference was made to section 73 of the Securities Ordinance (Cap.333) and the Leveraged Foreign Exchange Trading (Calls) Rules (Cap.451 Sub. Leg. H). Also, the drafting of the concept of "permissible communication" in section 3 of the Rules was modeled very closely on the UK Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.

THE RULES

5. Section 2 of the Rules contains the interpretation provisions which apply throughout the Rules.

6. Section 3 prescribes the following types of agreements and calls as excluded from the prohibition against unsolicited calls: -

(a) any agreement to sell securities of a corporation to, or to purchase securities from, a person who is already the holder of securities of that corporation;

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[1] "Call" is defined in section 174 of the SFO as meaning "a visit in person, or a communication by any means, whether mechanically, electronically, magnetically, optically, manually or by any other medium, or by way of production or transmission of light, image or sound or any other medium".

(b) any unsolicited call that is a "permissible communication", defined as any communication not made in the course of a visit in person, a telephone conversation or any other interactive dialogue during which statements and responses to them are exchanged immediately; and

(c) any unsolicited call made by a registered institution in relation to a leveraged foreign exchange contract, which complies with guidelines made by the HKMA.

PUBLIC CONSULTATION

7. The Commission released a consultation document and an exposure draft of the Rules on 19th October 2001 for comment by the public. A total of 14 submissions were received. The SFC considered all the comments received and revised the draft Rules as appropriate.

8. A draft of the Rules was considered by the Subcommittee at its meeting held on 29th April 2002. The SFC has in the light of Members' comments, introduced amendments with respect to both the types of exclusions and drafting. The amendments were considered by the Subcommittee at its meeting on 24 October 2002. Members expressed no further concern.

FINANCIAL AND STAFFING IMPLICATIONS

9. There are no financial or staffing implications for the Government.

COMMENCEMENT DATE

10. The Rules will come into operation on the day appointed for the commencement of the SFO, together with other subsidiary legislation necessary for the commencement. We expect this to take place shortly, after completion of the negative vetting procedure through the Legislative Council and allowing the industry a reasonable period of time for making necessary adjustments with reference to the subsidiary legislation. We aim to announce the commencement date by the end of 2002.

PUBLICITY

11. The Rules will be published in the Gazette on [29th November] 2002. The SFC will issue a press release on the same day.

ENQUIRIES

12. For any enquiries on this brief, please contact Mrs. Yvonne Mok of the Intermediaries Supervision Department of the SFC at 2842 7638.

The Securities and Futures Commission
25 November 2002

SECURITIES AND FUTURES (UNSOLICITED CALLS – EXCLUSION) RULES

(Made by the Securities and Futures Commission under section 397(1) of the Securities and Futures Ordinance (Cap. 571))

1. Commencement

These Rules shall come into operation on the day appointed for the commencement of the Securities and Futures Ordinance (Cap. 571).

2. Interpretation

In these Rules, unless the context otherwise requires –

"call" (造訪) has the meaning assigned to it by section 174(7) of the Ordinance;

"Monetary Authority guideline" (《金融管理專員指引》) means the Guideline of the Monetary Authority issued in November 1995 and published in the Gazette under section 7(3) of the Banking Ordinance (Cap. 155) as G.N. 4679 of 1995 on 17 November 1995, as amended and published under that section from time to time;

"recipient" (接收人), in relation to a communication, includes a person who reads or hears the communication;

"unsolicited call" (未獲邀約的造訪) has the meaning assigned to it by section 174(7) of the Ordinance.

3. Excluded unsolicited calls

(1) For the purposes of section 174(3)(a) of the Ordinance, section 174 of the Ordinance does not apply to any agreement –

(a) to sell securities of a corporation to; or

(b) to purchase securities of a corporation from,

a person who is already the holder of securities of that corporation.

(2) For the purposes of section 174(3)(d) of the Ordinance, section 174 of the Ordinance does not apply to any unsolicited call that is –

(a) a permissible communication; or

(b) made by a registered institution –

(i) in relation to a leveraged foreign exchange contract; and

(ii) which complies with the requirements under the Monetary Authority guideline that apply to a registered institution.

(3) For the purposes of subsection (2)(a), a permissible communication is any communication that is not made in the course of any of the following acts –

(a) a visit in person;

(b) a telephone conversation;

(c) any other interactive dialogue in the course of which statements and responses to them are exchanged immediately.

(4) In deciding whether or not a communication is made in the course of the act referred to in subsection (3)(c), the court shall have regard to the following factors the presence of any of which indicates a permissible communication –

(a) the communication is made to more than one recipient in identical terms (save for details of the recipient's identity);

(b) the communication is made by way of a system which in the normal course constitutes or creates a record of the communication which is available to the recipient to refer to at a later time;

(c) the communication is made by way of a system which in the normal course does not require the recipient to respond immediately to it.

Andrew Len Tao SHENG
Chairman,
Securities and Futures Commission

25th November, 2002

Explanatory Note

These Rules are made by the Securities and Futures Commission under section 397(1) of the Securities and Futures Ordinance (Cap. 571) for the purposes of section 174(3)(a) and (d) of the Ordinance. They exclude certain agreements and unsolicited calls from the application of section 174 of the Ordinance.